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No. 00-652

IN THE

Supreme Court of the United States

SEA HUNT, INCORPORATED,

Petitioner,

v.

KINGDOM OF SPAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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ARGUMENT

SOVEREIGN IMMUNITY v. FUTILITY; IS THERE A CONFLICT?

There are presently three (3) Petitions for Writ of Certiorari pending before the Court, all of which address identical issues of (1) whether an admiralty court's use of "implied abandonment" in an *In Rem* salvage action is prohibited by the United States Constitution; (2) when a sovereign nation intervenes claiming ownership of the *res*, must our admiralty courts require the states and/or the Salvors to show "express abandonment" of the *res*? (3) to show abandonment of a *res* by a sovereign must there be a congressional act providing authority to an administrative official and a written affirmative act by the administrative official formally abandoning sovereign ownership interests?

In *International Aircraft Recovery, LLC v. United States of America*, 218 F.3d 1255 (11th Cir. 2000), Petition for Cert. filed October 16th, 2000, Case No. 00-617, the Respondent UNITED STATES argues on page 9 of its January 24, 2001 Brief in Opposition that:

> Well settled doctrine rooted in the property [Public Lands] clause of the Constitution holds that the federal governments interests in property may not be impliedly abandoned, but rather can *only* be relinquished by an express, affirmative renunciation of property rights that is duly authorized by Congress. *United States v. California*, 332 U.S. 19, 39-40 (1947). . . .

In the KINGDOM OF SPAIN's January 11, 2001 Brief in Opposition, page 11, it is argued that:

> Both the United States and Spain agree that the [1902] Treaty provides that Spanish ships sunk in U.S. Territorial waters are accorded the same immunity as U.S. ships sunk in U.S. waters. As the Court of Appeals noted, U.S. vessels "may only be abandoned by an express, unambiguous, and affirmative act." . . . *United States v. California*, 332 U.S. 19, 39-40 (1947).

Judge Henry Friendly once observed that "Reality beats a quick retreat against the onslaught of argument." Based upon the Petitions by the *Commonwealth of Virginia* and *Sea Hunt*, and the Petition by *International Aircraft*, it should become obvious that all three are inextricably intertwined and should be consolidated by this Court for the purpose of "preserving adequate harmony and appropriate uniform rules relating to maritime matters . . . " *Knickerbocker Ice Company v. Stuart*, 253 U.S. 149 (1920).

In *International Aircraft*, the United States argues on pages 11 and 12 of its Brief in Opposition:

> Petitioner also errs in asserting (See Pet. 9, 19) that the decision below establishes new sovereign immunity principles that conflict with this Court's decisions in *Deep Sea Research*, *supra* and *The Davis*, 77 U.S. (10 Wall.) 15 (1869). . . . That contention, however, mischaracterizes the holding below and posits an illusory conflict with *Deep Sea Research* and *The Davis*. Nothing in the Court

> of Appeals decision purports to hold that some principle of sovereign immunity bars a federal court sitting in admiralty from determining claims against sovereign property that is not within the sovereign's actual possession. To the contrary, the Court did in fact *adjudicate competing claims* concerning the property and held, on the merits, that the government retained an ownership interest in the property and therefore had a right to reject salvage services. As such, the decision does not turn on considerations of sovereign immunity and does not in anyway conflict with *Deep Sea Research* or *The Davis*. (emphasis supplied)

The KINGDOM OF SPAIN argues on pages 15 and 16 of its Brief in Opposition:

> Sea Hunt asserts (Sea Hunt Pet. 9) that . . . "The Fourth Circuit is providing Spain a sovereign immunity and/or exemption for a direct proceeding *In Rem* against all vessels originally owned by Spain," contrary to this Court's decision in *California v. Deep Sea Research, Inc.* 523 U.S. 491 (1998). Sea Hunt simply misreads this Court's decision in *Deep Sea Research*. That decision holds that a state's immunity from suit under the Eleventh Amendment does not extend to an *In Rem* proceeding, at least if the *res* is not within the actual possession of the state. Assuming that the holding in *Deep Sea Research* applies with full force for a sovereign nation, the Court of Appeals decision in this case is entirely consistent with *Deep Sea Research*. Spain did not contend

> that the District Court lacked authority to determine ownership of the shipwrecks. Instead, Spain appeared before the Court and submitted a claim to the *res*. The Court below considered Spain's proofs of ownership, *evaluated Petitioner's counter-evidence*, and ruled in favor of Spain on the merits. That is a very different matter from holding that the sovereign immunity of the Kingdom of Spain extends to *In Rem* proceedings or that Spain is "exempt" from *In Rem* proceedings in admiralty. Sea Hunt's effort to manufacture a conflict with this Court' decision in *Deep Sea Research* is baseless. (emphasis supplied)

What . . . "competing claim" . . . would the Eleventh Circuit allow International Aircraft to assert against the aircraft? What . . . "counter-evidence" . . . would the Fourth Circuit allow Sea Hunt or the Commonwealth of Virginia to assert against vessels lost by Spain 250 years ago? When an intervening sovereign claims that the *res* was never "expressly abandoned" there is *no* competing claim or counter-evidence because it never existed! The sovereign intervenor wins — every single time!

Litigation is, in reality, the insider's game within the game. Attorneys who are to serve the interests of each member of the public (and whose labors are compensated by the public) are manipulating our detailed rules of procedure. Many judges, acting more like referees, become unwitting accomplices. Without the steady application of this Court's view of what is *really* happening, the procedural rules are being manipulated to avoid the crystal clear holdings of this Court. In *Florida Dept.of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 710 (1982), Justice Stevens, writing for the

plurality, was discussing whether a sovereign could obtain immunity from a maritime salvage lien in . . . "In Rem actions brought against vessels in which an official of the state, the federal government or a foreign government has asserted ownership of the *res*." Sixteen years later, Justice Stevens (in his specially concurring Opinion) in *California v. Deep Sea Research*, 523 U.S. 496, 509 (1998), conceded that an error had been made in *Treasure Salvors* and that,

> Having given further consideration to the special characteristics of *In Rem* admiralty actions, and more particularly to the statements by Justice Story and Justice Washington . . . I am now convinced that we should have affirmed the *Treasure Salvors* judgment in its entirety.

In effect, this Court has done so and, in effect, the United States working with the Kingdom of Spain has managed to circumvent these rulings.

It was nearly three years ago in *Deep Sea Research* that this Court again revisited the use of sovereign immunity in *In Rem* salvage actions. Quoting from *The Siren*, 74 U.S. 152 (1868) and *The Davis*, 77 U.S. 15 (1869), this Court held that the "fundamental premise" in those cases remains valid in today's *In Rem* admiralty actions. This Court explained the "fundamental premise" to be that:

> Proceedings *In Rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the Court. (citation omitted) The possession referred to was actual

> possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. [and that] The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the *res* at issue. *Deep Sea Research*, 523 U.S. at 507

Implicit within the argument advanced by the Kingdom of Spain in opposing the Commonwealth of Virginia and Sea Hunt's Petitions and by the United States in *International Aircraft* is the acknowledgment that arguing "sovereign immunity" would be futile; however, the United States (working with the Kingdom of Spain) has not hesitated to manipulate the rules of procedure in the admiralty courts to shift the burden from a sovereign intervenor claiming ownership to the States and/or the Salvor who must then provide proof of . . . "an express, affirmative renunciation of property rights that is duly authorized by Congress". By shifting the burden of proof from the intervening [sovereign] claimant to the states and/or Salvor, and then requiring proof of Congressional and administrative action (which did not exist in this country until after 1945 and which will, more than likely, *never* exist with regard to the Kingdom of Spain) requires the Petitioners, Commonwealth of Virginia and Sea Hunt, Inc., to do the *impossible*!

Our country's maritime history was "written" by ships of Spain, Portugal, Britain, France, etc. Thousands of ships were lost well prior to the advent of the legal concept of "express abandonment." Unless this Court consolidates *International Aircraft*, No. 00-617, *Commonwealth of Virginia*, No. 00-629 and *Sea Hunt*, No. 00-652 and

establishes a national standard allowing our admiralty courts to advocate "abandonment" based upon all of the facts and circumstances of each case our maritime history will be "abandoned." Practically every *in rem* salvage action involving an historic *res* will involve a sovereign intervenor claiming "ownership." The states and salvors will not *only* be precluded from further salvage but will lose all right title and interest to the *res* that has been recovered.

As pointed out by the Commonwealth of Virginia on page 9 of it's Petition, the only way the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106, can vest title to a shipwreck in a state within whose submerged lands it is imbedded is if the shipwreck has been "abandoned" by its original owner. By requiring the individual states and/or the private salvors to show "express abandonment" under a legislative act (before such a legislative act became a part of the legal concept of "express abandonment") means that nearly all historic vessels and historic aircraft that still exist will be "confiscated" by their original owners upon their discovery. "Express abandonment" as construed by the Eleventh and Fourth Circuits, totally destroys *any* state protection and responsible management of these historic resources. The individual states, working with private salvors under the ASA, and the Federal District Courts sitting in admiralty are in the *unique* position of insuring that the cultural riches of this country and other historic treasures recovered from the sea are shared with the public. *See Cobb Coin Company, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F. Supp 540, 559 (S.D. Fla. 1982); *International Aircraft Recovery v. The Unidentified Wrecked and Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1182 (S.D. Fla. 1999).

The passage of the Abandoned Shipwreck Act of 1987 was a *direct* result of this Court's 1982 decision in *Treasure Salvors*, *supra*. Was the Spanish Galleon *Atocha* "expressly abandoned" by the Kingdom of Spain when Treasure Salvors/ Mel Fisher found it in the early 1970's? Was the Spanish Galleon *La Galga* "abandoned" by its Captain and the Kingdom of Spain when Spanish salvage efforts commenced in August ended in October 1750 (Resp. 3)? Only this Court has the answer to these questions.

CONCLUSION

This Court has unanimously discarded the concept of an assertion of "sovereign immunity" in an *In Rem* salvage action where the *res* is not within the actual (physical) possession of the sovereign. Allowing the sovereigns (United States and Kingdom of Spain) to require our admiralty courts to shift the burden to the states and/or private salvors and requiring proof of "express abandonment" which did not exist at the time of loss is the functional equivalent of granting "sovereign immunity" to all sovereign nations. Using the considerable litigatory might of the United States and the Kingdom of Spain, there is a clear and present danger to the exclusive *In Rem* salvage jurisdiction of our admiralty courts. "Express abandonment" has now replaced "sovereign immunity" as a sovereign defensive *and* offensive legal weapon. When reduced to its simplest terms, our admiralty courts lose *In Rem* jurisdiction to adjudicate a salvage award and lose jurisdiction to allow the salvage to continue regardless of "possession" of the *res* by the Admiralty Court. The Respondent argues that . . .

> if the sovereign owned the *res* at the time it was lost, even though the sovereign subsequently

> *forgot* about the *res* (and *still* doesn't know where it was lost), a state and/or salvor cannot assert a maritime lien in the Admiralty Court because the sovereign can (and will) intervene and deny that it was "expressly abandoned!

The Spanish vessel *Juno* was lost in heavy fog 200 years ago. The *La Galga* was salvaged by her Captain until a storm came and . . . "*broke up what was left of the ship*" . . . over 250 years ago. (Pet. App. A at 6a). When did the legal *concept* of "express abandonment" (much less sovereign legislation) arise in our admiralty law? The time to address a national standard for a fact driven adjudication of abandonment is now! The ASA and the protection of our nation's maritime cultural heritage and maritime history demands it. Article III, Section 2 of our Constitution *requires* it.

Respectfully submitted,

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